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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 427 Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DEGRESAC MAUREL and G. SCHIRMER, INC.,
Petitioners,

against

THE SHANLEY COMPANY,
Respondent.

BRIEF FOR PETITIONERS.

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PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 3277-78-79 Broad.

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BRIEF FOR PETITIONERS.

Statement.

This action was brought to enjoin the defendant from publicly performing in a restaurant conducted by the defendant the principal vocal number of the copyrighted opera, entitled "Sweethearts." The vocal number performed in defendant's restaurant bears the same title as the opera, "Sweethearts," and consists of words and music. A copy of it is annexed to page 30 of the Record, marked Exhibit C.

It is admitted that the opera "Sweethearts" was duly copyrighted by the complainants (page 42);

that the vocal number "Sweethearts" is a component and important part of the opera; that it is a link of the dramatic action, and that the success and popularity of the opera are largely due to this vocal number. (Allegations of complaint not denied, page 15).

It is also admitted that the defendant caused the vocal number "Sweethearts" to be performed in its restaurant by its employees (page 15).

The vocal number was performed on a platform on which an orchestra was seated, and on which singers appeared (page 11).

It is admitted that the vocal number was performed as part of an entertainment given by the defendant for the amusement of its patrons (page 15). No special admission fee was charged for these entertainments, but it is alleged by defendant's secretary that it expected to sell some food or drink to those who entered its restaurant at the times when the performances were given (page 17).

It is admitted the entertainments were an incident of the defendant's business (page 18), and that they were advertised in the newspapers as features of defendant's business by advertisements reading as follows:

"SHANLEY'S,
Broadway—43rd to 44th St.
Perfection in Food and Service,
Inimitable Entertainment.

Famous for Dinners and Suppers

CABARET EXTRAORDINAIRE
Twenty Acts Every Evening 7 to 1.

SUPERIOR SEVEN-COURSE
LUNCHEON, 75c. (MUSIC)."

(Paragraph XV of complaint, not denied, page 16).

The word "Cabaret" as used in defendant's advertisements has acquired a well understood meaning. It indicates a class of entertainments given in restaurants and hotel dining rooms and advertised as inducements for the public to patronize these places (page 18). The class of entertainments known under the name "cabaret" is shown by a number of newspaper advertisements published by New York restaurant proprietors (pages 21-27).

The complainants contend that the public performance of a vocal number of a dramatico-musical work in the manner and under the circumstances shown is an infringement of two of the exclusive rights included in the copyright, namely:

1. Of the dramatic performing right defined in subdivision (d) of section 1, of the Copyright Act of March 4, 1909 (35 Stat., 1075), which reads as follows:

> "(d) To perform or represent the copyrighted work publicly if it be a drama * * * and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."

2. Of the musical performing right defined in subdivision (e) of Section 1, of the Act reading as follows:

> "(e) To perform the copyrighted work publicly for profit, if it be a musical composition."

The defendant contends that the complainants cannot avail themselves of the dramatic performing right secured by the copyrighting of the opera,

because they separately published and copyrighted the vocal number "Sweethearts" as a musical composition. As the vocal number, it is claimed, had thus been given the character of a musical composition, *a public performance thereof, if not for profit,* was not an infringement. It was further contended that the performance of the vocal number given by the defendant, in the manner shown by the record, was not a performance for *profit.*

The case was heard on bill, answer, affidavits and a stipulation as to certain facts. The District Court dismissed the bill (222 Fed. R., 344). On appeal the Circuit Court of Appeals held that the performance given by the defendant *could not be considered a performance for profit because no admission fee or direct pecuniary charge was exacted* (229 Fed. R., 340).

It was further held that the complainants had lost the dramatic performing right in the vocal number "Sweethearts" because the separate publication thereof did not contain in addition to the notice of the copyright in the vocal number, a notice showing that the entire opera was copyrighted.

Argument.

POINT I.

The performance of the vocal number "Sweethearts" in the defendant's public restaurant, given as a part of the operation of such restaurant business, and for the purpose of attracting patrons, was a public performance for profit.

The performance was given as a part of the operation of defendant's business.

Defendant is a corporation organized for the purpose of conducting a restaurant and place of public accommodation (page 14) and of "serving food and drink to patrons who pay the price therefor" (page 17).

While no *direct* charge is made for the privilege of witnessing the performances given, they are intended only for those who purchase food or drink and pay for it.

This sufficiently appears from the following statement of John J. Moran, defendant's secretary, viz.:

> "The only remuneration received by the defendant from any of the patrons who enter said restaurant is from the sale of food and drink that is ordered by the said patrons. There is no rule requiring the patrons to order or pay for a minimum of food or drink. A person who only desires a sandwich has as much right to enter said restaurant and receives as much attention from the management thereof as a person who desires to order an elaborate meal" (page 17).

In another part of his affidavit defendant's secretary states:

> "The music, however, was never the principal business of a restaurant keeper. It has always been and now is purely incidental to the restaurant business, and the price charged for food and service is the same without as with the music" (page 18).

It is quite evident that these performances constitute a part of the business of selling food and drink and that they are intended for and are ac-

cessible to none but patrons, that is, persons who order and pay for something, whether it be a sandwich or an elaborate meal.

The entertainment is not free for one who buys nothing.

In the affidavit of John Leffler, which was filed in support of the bill of complaint, it is stated that when he entered the defendant's establishment, a waiter came to him and asked him what he wanted to order (page 11).

The defendant publishes advertisements in which the patronage of its business by the public is requested. These advertisements speak for themselves. They bear evidence of the fact that the cabaret entertainments are held out as *inducements* to those who will buy meals and refreshments from the defendant.

In paragraph XV of the bill of complaint, which is not denied, it alleged:

"XV. That the defendant advertised the business conducted on said premises in the New York Review, the New York Times, and other papers published and circulated in the City of New York, in the manner following, to wit:

"SHANLEY'S
Broadway—43rd to 44th St.
Perfection in Food and Service
Inimitable Entertainment.

FAMOUS for Dinners and Suppers" (page 6).

CABARET EXTRAORDINARE

Twenty Acts Every Evening 7 to 1
SUPERIOR SEVEN-COURSE LUNCHEON, 75c. (MUSIC).

It can hardly be denied that the object of the defendant in giving its cabaret performances was to secure more purchasers for its articles of food and refreshment, and thereby more gain.

This was the view taken by Judge Lacombe when the case of John Church Company vs. Hilliard Hotel Company was heard in the U. S. District Court. His decision was as follows:

> "The circumstance that complainant could not prove any specific sum as 'profit' resulting from the playing of the copyrighted music seems to me immaterial. The place was 'public' although all the public could not gather in it and I think, as did the Judges in Sarpy vs. Holland, 99 L. T., 317, that *the hotel would not have paid for the playing of the piece unless in some way or other, they were to gain thereby.*"

In Sarpy vs. Holland, 99 Law Times, 317, the defendant Holland employed a band of musicians to play in his hotel. Cozens-Hardy, M. R., said:

> "This performance was paid for by Mr. Holland, the publican, with the view of gain; it was worth his while to pay I think 16 s. a performance. It was obviously part of the means by which he attracted customers and hoped to gain and did gain a profit in carrying on the business of the hotel. That being so, it seems to me impossible to contend that this was a performance at a gratuitous public entertainment. Obviously the people who

> went in large numbers every night went there not merely in the expectation, but with the certainty, that they would not go there, and indeed could not go there, without buying some of the commodities which Holland was there for the purpose of selling. The music was really part of the operations of the hotel."

The conclusion of the Master of the Rolls was not based on the circumstance that the musicians were paid, but on the fact that the performance was part of the means by which customers were attracted.

In Weistblatt vs. Bingham, 58 Misc., 328, a motion picture exhibition was given in an ice-cream saloon. Judge Crane of the New York Supreme Court, held:

> "While no entrance fee is charged for this exhibition, it is evident that it is conducted for the purpose of drawing trade and of gathering people into the place to purchase soda or ice cream while viewing the pictures. A person who came in and occupied one of the chairs at a table, without ordering something, I imagine would not stay very long. *In this indirect way a profit is made out of the moving picture show.*"

An entertainment given for the patrons of a restaurant, who are admitted on the understanding that they make some purchase, is not essentially different from an entertainment to which an admission fee is charged.

In one of the English cases each person desiring admission to an entertainment was required to buy

a refreshment ticket. (Wall vs. Taylor, Wall vs. Martin, 52 L. J. Q. B., [N. S., Part 2], 558, 559.)

The admission fee is sometimes disguised. Entertainments are given to which admission may be had on payment for a "hat-check," which entitles the holder to the cloak-room service.

If the proprietor of a dance hall furnishes the dancing floor and music without special charge, but exacts the purchase of a hat-check, is there any difference between the musical performance given by him and that given in a concert hall to which a general admission fee is charged?

The proprietor of the dance hall often sells refreshments to his patrons. He may derive more profit from the sale of refreshments than from the hat-checks and may come to the conclusion that he would attract more patrons and realize on the whole a larger profit by dropping the charge for the hat-check.

He would then admit the public without direct charge and yet he would reap an increased profit from those admitted who would all be expected to make some purchase.

Would it be a correct view of the musical performances given in such a dance hall to say that they are for profit while the payment for a hat-check is exacted, and not for profit when no such direct charge is made, but a purchase is "expected" —which means exacted—from the patrons?

In view of what has been said, it is not a reasonable construction of the words "for profit" to limit them to *direct* pecuniary charges exacted from the audience, as was done by the Circuit Court of Appeals in the case at bar and in John Church Co. vs. Hilliard Hotel Co., 221 F., 229.

In this connection see

Pierce vs. Milwaukee & St. Paul R. R. Co., 23 Wis., 387.

In its opinion in the Church Co. case, the Circuit Court of Appeals says:

> "If the complainant's construction of it (the Copyright Act) is right, then a church in which a copyrighted anthem is played is liable, together with the organist and every member of the choir, not only to injunction, but, in damages in the sum of $10 for each performance, and the individuals perhaps to fine and imprisonment in addition, because there is an expectation that the congregation will be increased by making the service more attractive" (221 Fed. R., at page 231).

No such deplorable result as is pictured by the Court would follow from the construction claimed by the complainants.

A church is not a business organization. It is not formed or conducted for purposes of profit. An increase of its membership will not increase its gain or profit. Hence, an entertainment given by a church for the purpose of increasing the congregation, would not be a performance for profit. Performances for religious purposes are clearly exempted by Section 28 of the Act.

A very different case is presented when a musical performance is given by a business corporation *as a part of the operation of its business and for the purpose of attracting patrons to the business, which means purchasers for its goods and service.*

POINT II.

The Copyright Law, in Section 28, expressly specifies in what instances musical works may be freely performed; hence, no construction of the law should prevail which would permit any unauthorized performances except those expressly enumerated.

In construing the language of the copyright statutes, regard should be had to the intention of Congress, and to the object of copyright legislation.

The question of the scope of musical copyright is dealt with in Section 28 of the Copyright Act of 1909.

The second half of Section 28 provides as follows:

> "Provided, however, that nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

This provision indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes, and of the classes above enumerated.

The clause is incompatible with any construction of section 1, sub-division e, which would per-

mit the free production of musical works like the one here involved for purposes of business, that might result in personal gain, whether directly or indirectly.

The copyright act as passed in 1909, was framed by the Committee on Patents of the House of Representatives, collaborating with the Committee on Patents of the Senate. When the bill in its final form was submitted to Congress, the Committee on Patents of the House of Representatives submitted a report recommending the passage of the bill. The report is dated February 22nd, 1909, and is entitled "60th Congress, 2d Session, House of Representatives, Report No. 2222." On page 16 of said Report, it is said as to the latter half of Section 28:

> "The existing law provides that any person publicly performing a dramatic or musical composition without the consent of the proprietor of the copyright shall be liable for damages of not less than $100 for the first and $50 for every subsequent performance, and this prohibition covers cases of public performances where the performance is not for profit. We have provided in this section that where the public performance is given by public schools, etc., for educational or charitable purposes, and not for profit, it may be done without subjecting those who give the performance to any suit for damages; and we further provide that the music used for the performance may be rented, borrowed, or obtained from public libraries or other public schools," etc.

The intention to limit free performances to the instances specified in Section 28 is here clearly expressed. *Expressio unius est exclusio alterius.*

As Congress concurred in the report of the joint Committee and passed the bill in the form recommended in this report, the report may be cited as some evidence of the legislative intent.

The construction of section 1, sub-division e, contended for by the complainants, is the only construction that is in harmony with the purposes of copyright legislation as they have been long recognized.

The object of copyright legislation is to secure to the author all the benefits that may be derived from the use of his works.

Prior to 1897, composers of musical works not belonging to the class of dramatico-musical works and therefore not entitled to protection as dramatic works, were not entitled to the exclusive performing rights in such compositions.

This inequality of protection was removed by the Act of January 6, 1897, which amended Section 4966 of the Revised Statutes so as to make it equally applicable to both dramatic and musical compositions. In White Smith Co. vs. Apollo Co., 209 U. S., at page 16, this Court, speaking by Mr. Justice Day, said:

> "The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performances."

The revision of the copyright laws which resulted in the passage of the present Act was taken up by Congress in response to a message of President Roosevelt, dated December, 1905, in which the defects of the then existing copyright laws were pointed out and the desirability of so revising the

law as to secure the complete protection of authors was urged.

Such being the object of the revision of the copyright laws in the form of the present Act, it is reasonable to assume that Congress had no intention to take away any substantial protection previously granted to composers.

The instances mentioned in Section 28 where the performance of musical works for certain charitable and educational purposes is permitted, do not place the composer to any material extent in a less favorable position than he enjoyed under the law of 1897, because it had long been the prevailing custom to permit free use of musical works for charitable and educational purposes.

The purpose of the Copyright Law would be to a large measure defeated if the permission of free performances were extended by construction beyond the instances specified in Section 28.

POINT III.

By the separate publication of the vocal number "Sweethearts" containing one copyright notice which correctly states the year when both the entire opera and the separate number were copyrighted and the name of the proprietor of both copyrights, all rights secured by the copyright in the entire opera, including the dramatic performing right, are preserved with respect to the vocal number.

The vocal score of the comic opera "Sweethearts" was copyrighted in the year 1913, as a

"dramatico-musical composition," one of the classes specified in Section 5 of the Copyright Act. The copyright was secured by publication with the following notice of copyright, viz.:

"Copyright, 1913, by G. Schirmer."

Subsequently, but during the same year, the vocal number "Sweethearts," was separately published with the following copyright notice:

"Copyright, 1913, by G. Schirmer."

In the Copyright Office the vocal number "Sweethearts," was registered as a musical composition.

The title of the separate publication of the vocal number is as follows:

"Sweethearts

Waltz-Song from the Comic Opera Sweethearts.

Book by Harry B. Smith & Fred de Gresac.

Lyrics by Robert B. Smith.

Music by Victor Herbert."

(Exhibit C, annexed to page 30.)

The Circuit Court of Appeals held that the petitioners had lost the dramatic performing right in the vocal number "Sweethearts" because they failed to insert on the separate publication thereof a notice stating that the entire operatic work was copyrighted.

This ruling introduces a new requirement as to notice, and a new penalty for the failure to con-

form to such requirement, which requirement and penalty are at variance with the language and intent of the Copyright Act.

When a composer copyrights his opera by publication, he is not required to state in his notice of copyright whether he classifies it as a dramatic work or as a musical composition. A general notice of copyright is sufficient.

Upon publication with a general copyright notice, the composer or owner of the work acquires all the rights enumerated in Section 1 of the Copyright Act (35 Stat., 1075) which are applicable to his work.

If a work is equally suitable for several of the uses and methods of reproduction mentioned in Section 1, the exclusive right to all of them is secured by publication.

And all these rights are secured before the work is classified. The owner is not required to classify his work until after the copyrighting has been effected. The specification of the class is to be made in the application for registration of the copyright (Section 5).

As all the rights mentioned in Section I have become vested in the copyright proprietor before he classifies his work, his manner of classifying it could only affect his rights by implying an abandonment from the selection he makes among the classes mentioned in Section 5.

But Congress expressly forbade any such implication by providing at the end of Section 5: *"nor shall any error in classification invalidate or impair the copyright protection secured under this Act."*

Under this saving clause of Section 5 a composer of an opera who copyrights his work by pub-

lication and then classifies it as a musical composition, does not lose the right to claim protection for it as a dramatic work.

The same reasoning applies to a part of an opera separately published with notice of copyright, when such part is classified as a musical composition.

Like the complete operatic work, a vocal number or selection taken from it may be classified as a dramatico-musical work, or as a musical work.

The fact that the composer or owner classifies it as a musical composition cannot, under the last clause of Section 5, be held to be an abandonment of any right of protection which existed in such number or selection prior to and independent of such classification.

The decision of the Circuit Court of Appeals furthermore restricts the scope of Section 6 of the Act in a manner which is in conflict with the language and intent of the law. Section 6 provides as follows:

> "That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works published with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Under the above section an arrangement of a part of an opera shall be treated and may be copyrighted as a new work, and its publication shall not affect the scope of any copyright previously acquired in any matter included in such new work.

If such an arrangement is to be treated as a new work, only one copyright notice stating the year when such new copyright was secured and the name of the copyright proprietor is required.

The same view was taken by the Circuit Court of Appeals for the Second Circuit in West Publishing Co. vs. Edward Thompson Co., 176 Fed. Rep., 833, 837, where it was said:

> "Section 6 of the Act of 1909 (Act March 4, 1909), which is obviously declaratory, seems to confirm Justice Clifford's view (in Lawrence vs. Dana, 4 Cliff., 1) that there is but one copyright of the same book, that additions and improvements make a new book, and that the only notice required is of the date of entry of the last edition."

There would be no reason for the provision in Section 6 preserving the full force of any subsisting copyright in any matter used in another form in a new copyrighted publication, if it were intended that in such new publication notice of the prior copyright must be given.

If two copyright notices were necessary, one of the old and one of the new copyright, the copyright in the old matter as well as in the new matter, or in the new form, would be protected without Section 6.

If notices of two copyrights were required, the work would not be treated as one new work, but as an amalgamation of an old work and a new work.

In respect to the copyright notice, the intent of Congress to avoid the need of more than one notice in one publication is evident.

Section 19 provides that one notice of copyright in each volume or in each number of a newspaper or periodical shall be sufficient.

Section 46 permits the name of the assignee to be inserted in place of the original copyright proprietor, thus making unnecessary the naming of successive copyright owners.

There is also apparent a policy of guarding against the loss or abandonment of copyright by mere mistake or inadvertence. That policy is shown in the closing provision of Section 5 and also in Section 20, which provides that the omission of the prescribed notice by accident or mistake shall not invalidate the copyright.

POINT IV.

The public performance of the vocal number "Sweethearts" was an infringement of the exclusive dramatic performing right secured by Section 1, subdivision (d) of the Copyright Act. Whether performance of a dramatic work is for profit or in the manner of a dramatic entertainment, is immaterial.

A. *The opera "Sweethearts" is a drama within the meaning of Section* 1, *subdivision* (*d*) *of the Copyright Act of* 1909.

Operas have been classed with dramas since the Act of August 18, 1856, which granted exclusive performing rights in dramatic works.

Drone on Copyright, page 589.
The *Iolanthe* Case, 15 F. R., 439, 442.

The Copyright Act of 1909 classifies dramatico-musical works with dramas (Section 5, Subdivision d; Section 25, b, Subdivision Fourth).

B. *The protection of the exclusive dramatic performing rights in the opera extends to every material part thereof.*

It is admitted that the vocal number "Sweethearts" is a material part of the opera and is itself a dramatic composition.

The following facts alleged in paragraphs IX and XII of the bill of complaint are not denied, viz.:

> That the vocal number "Sweethearts" was written and composed as and *is a component part of the opera;* that it is a *link of the dramatic action* of the opera; that it was performed as a part of and in the performances of the opera; that it is *an important part of the opera,* being the *leading vocal number of the opera,* and that *the success and popularity of the opera is largely due to this vocal number* (page 4).

Under Section 3 of the Copyright Act the dramatic performing right in the entire opera protects all its copyrightable component parts.

Section 3 reads:

> "That the copyright provided by this Act *shall protect all the copyrightable component parts of the work copyrighted, and all matter*

therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

C. *It is conceded that the unauthorized public performance of a copyrighted dramatic work is an infringement, whether it be given for profit or not.*

D. Under Section 1, subdivision d, of the Copyright Act, the public performance of a dramatic work in any manner whatsoever is an infringement if such performance is unauthorized.

It is not necessary to show that the performance was itself part of a dramatic entertainment.

But the undisputed facts in the case at bar show that the performance of the vocal number "Sweethearts" was given as a part of a dramatic entertainment. The entertainment was advertised as consisting of twenty acts.

The rendition of a song is never described as an "act" unless it forms a part of a dramatic or theatrical performance.

The entertainment given by defendant consisted of the rendition of music and the singing of songs on a platform erected in defendant's restaurant. That platform answered the purposes of a stage.

> Mayor vs. Eden Musee Co., 102 N. Y., 593, 595.

The defendant designates the entertainment by the term "Cabaret Extraordinaire" (page 6).

The meaning of the term "cabaret" may be gained from the advertisements of the leading New York restaurants and hotels, which are found in the record as part of the affidavit of Victor Herbert (page 13).

According to these announcements, which represent the prevailing practice in this respect, the cabaret is an entertainment of a dramatic character.

In its most developed form the cabaret is a regular show divided into acts.

The defendant can hardly claim that its entertainment offered less than other cabarets when it is announced as an *extraordinary cabaret* consisting of twenty acts.

But the protection provided by dramatic copyright would be very insecure if it depended upon proof that an unauthorized performance was given with the usual appurtenances of a theatrical show.

In Russell vs. Smith, 12 Q. B., 217, 236, it was said:

> "We should take away a part of the protection conferred on authors if we held that there could be no public representation without these accompaniments."

It is true that the defendant's performance was not in costume and the stage had no proscenium, wings or back drop.

But in these respects the performance differed less from the usual dramatic performance than a motion picture exhibition which substitutes photographs for living actors and a screen for the stage.

It was the purpose of Congress to protect the author against subterfuge and indirect infringe-

ment when it expressly extended dramatic copyright to the right to perform the work *"in any manner or by any method whatsoever."*

POINT V.

The contention that the complainants by selling copies of the separately copyrighted vocal number impliedly gave a license to the purchasers to publicly perform it, is refuted by the express provisions of the Copyright Act.

Section 41 provides as follows:

> "Sec. 41. That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

The rights enjoyed by a musical author under the Copyright Law, Section 1, are to print, reprint, publish, copy and vend the copyrighted work; to arrange or adapt it; to perform the copyrighted work publicly, if it be a dramatic work, and publicly for profit, if it be a non-dramatic musical work, and to make any arrangement or setting of it or of the melody of it in any system

of notation. Under Section 41 the sale of a copyrighted musical work does not transfer to the purchaser any of the rights secured by the author under Section 1, Subdivisions a, b, d and e.

The question whether publication and sale of a musical composition deprives the author of the exclusive right of representing or performing it, came up for decision in the case of Chappell vs. Boosey, 21 Chancery Division (1882), pages 232-6. It was argued in that case that the very object of publishing a song as a book is that the public may buy and sing it, and the author cannot afterwards be heard to say that the person buying the song from him must not put it to the use for which it was bought.

Judge North in his decision said:

> The author had two different rights: one, that of copyright proper, preventing the multiplication of copies of the piece itself; the other being what may be called the acting right or performing right, conferring upon him the power of preventing other persons from publicly representing or performing the piece without his consent. * * *
>
> "Those rights are quite distinct, each being a separate property, and each capable of being assigned without the other. * * *
>
> "Now, it is contended for the defendant, that the fact of the publication for sale of a musical composition as a book prevents the subsequent acquisition or enjoyment of the acting or performing right. Why should it do so? It is said that no one would buy such a piece if the purchaser could not use the piece he paid for, and therefore that the sale of the

piece necessarily carries with it the right to make such use of it as the purchaser thinks fit. But this consequence does not follow; for it is only the performance of the piece in public, that under the section I have just read the existence of the acting or performing right prevents; and it is obvious that the greater number of sales of musical pieces take place to persons for private use and without having any public performance in contemplation.

"In the next place, I think, that if the publication of a musical composition as a book before the piece had been publicly performed prevented the subsequent acquisition of any acting or performing right, it must follow that the publication of the same composition as a book at any time after the piece had been publicly performed, would from that time forward put an end to any acting or performing right in the piece existing prior to such publication, for the reasons existing in the former case would be of equal weight in the latter. If so, the defendant's contention comes in short to this, that the enjoyment of, or the power of acquiring, the acting or performing right is determined by the publication of the book at any time; and the author must choose whether he will abstain from publishing the book, and thus be unable to reap the benefit of the copyright therein which the Act confers upon him, in which case he can enjoy the acting right; or whether he will publish the book, and lose thereby the acting or performing right. I cannot find anything in the Act, or in reason, to support this contention."

It is illogical to claim that purchasers of a copy of a part of an opera should acquire by such purchase rights which they would not acquire by purchasing copies of the entire opera.

The separate publication of a part places that part within easier reach of those who wish to perform it. A higher price must be paid by them for the whole than for the part.

In the case at bar the respective prices of the entire vocal score, of the selection and of the separate number are printed on the title page of Exhibit C (page 54).

The complainants would receive $2 for the entire vocal score, and it is admitted that by selling this score they do not impair their dramatic rights.

But by selling a selection at 75 cents or a number at 60 cents it is claimed that they abandon their dramatic rights. It would be both illogical and unjust to thus penalize the issuing of the cheaper publication.

The purchasers have notice in the case of the whole opera, as well as of a separate number, that they buy subject to the dramatic rights of the copyright proprietor. Such notice is conveyed to them by the copyright notice.

Proper copyright notices are inserted on all the separate publications. (See Exhibits C, D and E.)

In the District Court mention was made of the reservation of performing rights that was formerly required under the English Act of 1882.

But that requirement has been done away with, the Act of 1882 as well as the amending Act of 1888 having been repealed by the English Copyright Act of 1911. This change was made in accordance with the provisions of Article 11 of the Berlin Copyright Convention which is as follows:

"Article 11.

The stipulations of the present Convention apply to the public representation of dramatic or dramatico-musical works, and to the public performance of musical works, whether these works *be* published or not.

Authors of dramatic or dramatico-musical works are protected during the term of their copyright in the original work against the unauthorized public representation of a translation of their works.

"In order to enjoy the protection of this article, authors, in publishing their works are not obliged to prohibit the public representation or public performance of them."

(Report, Library of Congress, 1909, pages 111-112; Weller, Stage Copyright, pages 34, 186.)

The decrees below should be reversed and judgment should be directed as prayed for in the bill of complaint.

Respectfully submitted,

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